In the Supreme Court of the United States

OCTOBER TERM, 1943

UTAH COPPER COMPANY, ET AL., APPELLANTS,

vs.

RAILWAY COMPANY, ET AL.

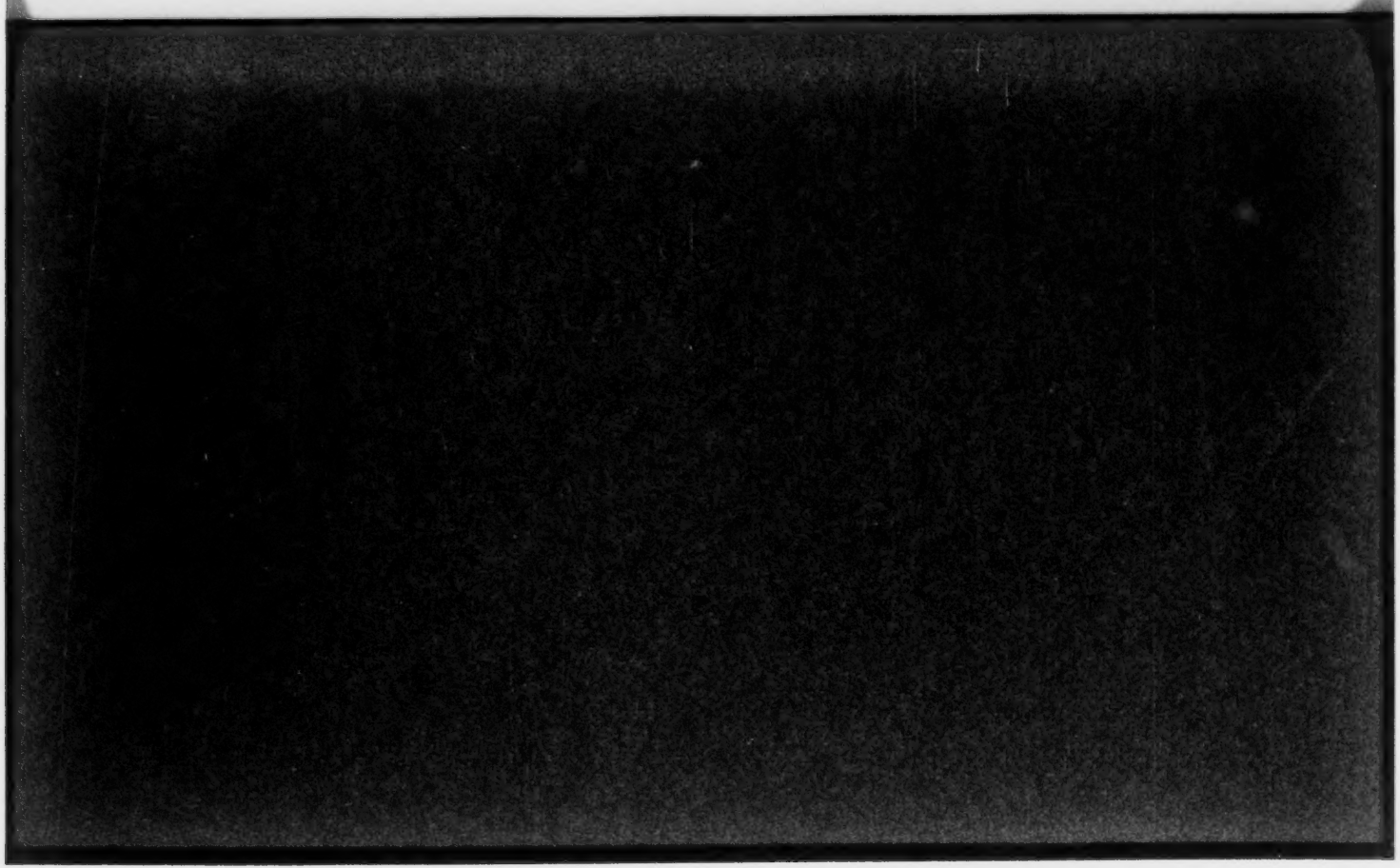
RAILROAD COMMISSION OF UTAH, ET AL., APPELLANTS,

vs.

RAILWAY COMPANY, ET AL.

On Appeals from the District Court of the United States for the District of Utah.

BRIEF FOR THE APPELLANTS



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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 479

UTAH COPPER COMPANY, BINGHAM AND GARFIELD RAILWAY COMPANY, AND KENNECOTT COPPER COMPANY, PETITIONERS

v.

RAILROAD RETIREMENT BOARD, RAILWAY LABOR EXECUTIVES ASSOCIATION, AND BROTHERHOOD OF RAILROAD TRAINMEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RAILROAD RETIREMENT BOARD

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 693) is reported in 129 F. (2d) 358. The opinion of the District Court of the United States for the District of Colorado (R. 108) is reported in 41 F. Supp. 763.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 27, 1942 (R. 702). A petition

for rehearing was denied August 11, 1942 (R. 715). The petition for a writ of certiorari was filed on October 22, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether certain persons engaged in transporting ore by the use of facilities of a common carrier were properly determined by the Railroad Retirement Board to be "employees" of the carrier within the meaning of that term in Section 1 (b) of the Railroad Retirement Acts of 1935 and 1937 as amended (50 Stat. 307, 54 Stat. 264, 785, 45 U. S. C. Sec. 228a).

2. Whether a copper mining company which is under common control with a common carrier and which operates railroad repair shops for the latter was properly determined by the Railroad Retirement Board to be an "employer" within the meaning of Section 1 (a) of the Railroad Retirement Acts, and whether its employees, rendering services for compensation in its repair shops, were therefore "employees" within the meaning of Section 1 (b) of those Acts.

STATUTES INVOLVED

The pertinent provisions of the Railroad Retirement Act of 1937 as amended appear in the Appendix.

STATEMENT

Petitioner Bingham and Garfield Railway Company was organized as a common carrier and its facilities were constructed primarily to provide transportation for the ores of its parent the Utah Copper Company of New Jersey (the predecessor of petitioner Utah Copper Company) (R. 209, 210, 211, 217, 218, 219). From the beginning of operations in 1911 until September 1, 1920, the railway company transported the ores under public tariffs and the individuals employed in this transportation were employees of the railway company (R. 210–212, 218–220, 304, 305, 364). However, on or about September 1, 1920, for the admitted purpose of avoiding the application of the recapture provision of section 15a of the Interstate Commerce Act to the excess income of the railway company, the copper company took title to the ore-hauling equipment and entered into an agreement dated May 28, 1920, with the subsidiary railway company which purported to grant to the copper company the right to conduct the ore transportation then being performed by the railway company (R. 231). As a result of the agreement the copper company was substituted as the maker of the pay checks of the individuals employed in this service, but no substantial change occurred in the conduct of ore transportation operations. The same railroad officers and employees who before

the execution of the agreement had instructed the men engaged in ore transportation as to the work to be done and the manner and means of performing it, and who had engaged these men for service or discharged or disciplined them, continued, after the execution of the agreements, to exercise the same functions with respect to the same men. (R. 249, 252, 319, 325, 326, 329, 330, 331, 334, 364.) The entire ore movement of the railroad continued under the complete control and supervision of the officers and employees of the railway company (R. 249, 252, 319, 325, 326, 330, 331, 334, 364).

Upon the execution of the trackage agreement, the railway company also turned over its railroad repair shops at Magna to the copper company and through its own employees the latter thereafter performed all repair operations on all railroad equipment—i. e., that used in common-carrier operations as well as that used in ore hauling (R. 234, 264, 265, 270, 337, 338).

A number of the individuals employed after September 1, 1920, in the ore transportation service on the railroad and in the railroad repair shops of the copper company at Magna filed with the respondent Railroad Retirement Board applications for annuities under the Railroad Retirement Acts, claiming that their service in such ore transportation and repair shop operations was creditable under the Railroad Acts as service to covered employers (R. 199–200). The Board ordered a hearing before an examiner, and after the hear-

ing, at which opportunity was given to all interested parties to present evidence and arguments, the examiner issued a report. Exceptions to the report were filed, and the Board rendered its decision on the basis of the evidence and arguments presented (R. 29, 117, 171, 199, 201–203). The Board found (R. 51–53) that the persons employed in the ore transportation service were "in the service" of the railway company and therefore were "employees" of that company within the meaning of Section 1 (b) of the Acts; and further that the persons employed in the railroad repair shop were also "employees" under Section 1 (b) because in its operation of the repair shops the copper company was an "employer" within the meaning of Section 1 (a) of the Acts and the employees rendered service to it for compensation.

Petitioners then brought suit in the District Court of the United States for the District of Colorado under Section 11 of the Railroad Retirement Act of 1937 (50 Stat. 307, 315, 45 U. S. C. Sec. 228k) to set aside the Board's decision. The district court held that in reviewing Board decisions under Section 11 of the Railroad Retirement Act of 1937, the authority of the court is limited to the question whether the Board's decision was arbitrary or capricious or unsupported by substantial evidence; and upon finding that there had been a full and fair hearing before the Board, and that the record before the Board con-

tained substantial evidence in support of the decision, the court dismissed the suit (R. 108–113). The United States Circuit Court of Appeals for the Tenth Circuit affirmed the judgment of the district court (R. 702) but on different reasoning. The circuit court of appeals stated that a reviewing court was not bound by the Board's decision as to the employee status of the workers involved and that the district court had erred "in dismissing the proceedings on the ground that the decision of the Board in this respect was final because supported by competent evidence" (R. 698). The court found as an independent proposition, however, that the workers engaged in ore haulage were "employees" of the railway company; and further that the copper company, in its operation of the railroad repair shops, was an "employer" and that its repair shop workers, rendering service to it for compensation, were therefore "employees" under the Act (R. 701–702).

ARGUMENT

The court below correctly held that on the facts appearing in the record, the persons engaged in ore haulage were "subject to the continuing authority" of the railway company (Railroad Retirement Act, Sec. 1 (c)) and therefore were "employees" within the meaning of Section 1 (b) of the Act. Congress, in framing the Railroad Retirement Act, was concerned with describing objectively those persons who for railroad retire-

ment purposes should be considered in railroad service, not with giving precision to common law or other conceptions of a servant. With respect to the benefits provided by the Retirement Acts, the individuals whose status is here at issue should occupy the same position after 1920 that they held before that date, and Congress in defining service for purposes of the Railroad Retirement Act used apt language to achieve that end. Likewise, the court correctly held that since the copper company was under common control with the railway company, the former was an employer within Section 1 (a) of the Act and its repair shop employees, rendering services to it for compensation, were "employees" within Section 1 (b).[1]

[1] While the court below thus correctly determined the question of coverage, its reasoning on the question of judicial review departs from principles established by this Court. We do not urge the court's error in this matter as a reason for granting certiorari. Since, however, if the writ is granted, we shall urge affirmance on the grounds relied upon by the district court, we believe that some mention of the question is appropriate.

The circuit court of appeals ruled that the determination of employee status under the Railroad Retirement Acts was a "jurisdictional" question, to be decided *de novo* by reviewing courts and that therefore the Board's findings on this point, even though supported by substantial evidence, were not conclusive. It reached this conclusion by relying on *United States* v. *Idaho*, 298 U. S. 105. But the statute involved in *United States* v. *Idaho* (as the Court there recognized) contemplated independent judicial determination of the question there involved, regardless of whether the Commission had made a determination, or whether it was a party

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Petitioners, however, urge as reasons for allowance of the writ that (1) the decision below conflicts with decisions of this Court and decisions of other circuit courts of appeals, (2) the decision below conflicts with determinations of the Interstate Commerce Commission as to the meaning of

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to the judicial proceeding. However, the Railroad Retirement Acts contain no such provisions for independent judicial proceedings to determine employee status. The exclusive character of the Board's jurisdiction on this question in the first instance is clear. Cf. *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. The function of the Board is to make monetary awards to certain classes of individuals, pursuant to congressional mandate (Railroad Retirement Act, Section 10 (b) 2, Appendix). The amount awarded to an individual depends, in part, upon the number of years of compensated service rendered as an employee under the Act. Thus, even as to one who is admittedly an employee with respect to part of his service, a question may arise as to his employee status with respect to other service. In such a case, the Board's determination of employee status affects only the amount of the annuity to be awarded. And for present purposes no practical distinction can be drawn between the cases in which the employee status question affects only the amount of annuity to be awarded, and those in which it goes to the right to receive any annuity. The Act makes no distinction between the effect to be given to a Board decision in the one case, and the effect to be given the decision in the other. On the contrary, it expressly provides (Section 10 (b) 1) that "The Board shall have and exercise all the duties and powers necessary to administer this Act and the Railroad Retirement Act of 1935. The Board shall take such steps as may be necessary to enforce such Acts and make awards and certify payments." Thus, less explicitly, but not less substantially than the Bituminous Coal Commission in *Gray* v. *Powell*, 314 U. S. 402, the Railroad Retirement Board is au-

the term "employee" in the Railway Labor Act (45 U. S. C. Sec. 151), and (3) the meaning of the term "employee" in the Railroad Retirement Acts raises important questions with respect to the meaning of that term in other federal and state legislation.

1. The decisions asserted to conflict with the decision of the court below involved the scope of the employer-employee relationship under common law or various statutory standards other than those prescribed by the Railroad Retirement Acts. In view of the special definition of that relationship in the Railroad Retirement Acts [2] and the general statutory policies for which it is made significant under those Acts, the norms of tort liability—either statutory or common law—are of questionable relevance. Cf. *Bowman* v. *Pace Co.*, 119 F. (2d) 858, 861 (C. C. A. 5). Moreover, assuming the relevance here of decisions delineating the scope of the employer-employee relationship for other purposes, no conflict is shown. In both *Robinson* v.

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thorized to determine the applicability of the legislation it administers to persons whose status is generically defined in the legislation. Moreover, the Board's authority in this case is at least as explicit as was the authority of the Federal Communications Commission to determine the status of the Rochester Telephone Corporation under the legislation involved in *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125. The scope of judicial review which was outlined in those cases applies equally here. Cf. *Sunshine Anthracite Coal Co.* v. *Adkins*, 315 U. S. 381, 400.

[2] See Appendix, *infra*, pp. 14–15.

Baltimore & Ohio R. R. Co., 237 U. S. 84, and *Hull* v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475, persons performing services for railroads were held not to be their employees. But the actual direction and control by the railroads of the day-to-day activities of the persons was far less substantial than that involved in this case. See also *Docheney* v. *Pennsylvania R. Co.*, 60 F. (2d) 808 (C. C. A. 3), certiorari denied, 287 U. S. 665. Indeed, where the working relationship of employee and employer approximated more closely that existing here, the cases cited by petitioners support rather than conflict with, the decision of the court below. See *Linstead* v. *Chesapeake & Ohio Ry. Co.*, 276 U. S. 28; *Standard Oil Company* v. *Anderson*, 212 U. S. 215.

2. The determination of the Interstate Commerce Commission upon which petitioners rely mainly in asserting a conflict with the decision of the court below was made in a proceeding under the Railway Labor Act. As petitioners admit, however (Pet. 11–12 n.), the allegedly conflicting determination was the ruling of a hearing examiner, not of the Commission itself. When the case ultimately reached the Commission for decision (246 I. C. C. 757), the examiner's proposed report was not accepted because the Commission (citing *Ore Dock Foremen and Laborers*, 246 I. C. C. 703), held that it lacked jurisdiction to resolve the issue of employment status. Cf. *Hudson and Manhattan*

Railroad Co., 245 I. C. C. 415. Although a reargument in that case has been granted there is at present no conflict between any Commission determination as to the coverage of the term "employee" in the Railway Labor Act [3] and the decision below.[4]

The other administrative proceedings urged as conflicting with the decision below (Pet. 20–23) in no way relate to the scope of the employer-employee relationship.[5]

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[3] The Railway Labor Act provides that: "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: * * *" (44 Stat. 577, 54 Stat. 786, 45 U. S. C., Sec. 151).

[4] Indeed the dissenting Commissioner in that case urged that the persons there involved were "employees" under the Railway Labor Act. 246 I. C. C. 757, 758.

[5] They all involve the legality of the trackage agreement of 1920 in the light of statutory requirements (both federal and state) governing rates and financial and accounting transactions. (138 I. C. C. 40, 45, 59; 189 I. C. C. 415.) Not only was the issue of employee status not involved, but it does not appear that the employees were parties or that any evidence was introduced on their behalf. Moreover, the Interstate Commerce Commission made no findings, and without opinion merely "discontinued" its proceeding for "good cause appearing." 73 I. C. C. 768. Similarly, the

3. As indicative of the importance of the question here presented petitioners urge that other legislation also purports to regulate various incidents of the employer-employee relationship, and presumably, therefore, that a decision in this case will clarify their obligations under the other statutes. But the precise coverage of the National Labor Relations Act, or the Fair Labor Standards Act, or the Federal Employers' Liability Act, is not mechanically controlled by the definition of the term "employee" in the Railroad Retirement Acts. And a decision on the latter question does not foreclose inquiry into the others. Clearly, a determination in one case under the Railroad Retirement Act can do little to resolve petitioners' (or others') pervasive uncertainty as to their duties to their employees.

CONCLUSION

Although the erroneous ruling of the court below on the question of the scope of judicial review presents important questions[6] the case was cor-

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Utah Commission dismissed its proceedings, stating as the ground therefor that it was "unable to say that a contemporaneous advantage moves to the Copper Company and to the disadvantage of other shippers." (R. 286; Ex. 40, R. 569, 576.)

[6] Apart from its significance for judicial review of administrative determinations generally, the ruling of the court below has particular significance for the large volume of pending and potential suits for annuities under the Railroad Retirement Acts, most of which revolve about the question of employee status.

rectly decided and no conflict in result with decisions of other courts is presented. We respectfully submit, therefore, that the petition for writ of certiorari should be denied.

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NOVEMBER 1942.